

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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**In the Matter of:**

**Implementation of Section 309(j) of the  
Communications Act -  
Competitive Bidding for Commercial  
Broadcast and Instructional Television  
Fixed Service Licenses**

**MM Docket No. 97-234**

## Reexamination of the Policy on Comparative Broadcast Hearings

GC Docket No. 92-52

## Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases

GEN Docket No. 90-264

## REPLY COMMENTS

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## **SUMMARY**

The ITFS community (with one lone exception), uniformly opposed the application of Auction Authority to ITFS. First and foremost, Congressional action in the adoption of the 1993 Budget Act as well as the 1997 Balanced Budget Act reflects that Congress equated ITFS with non-commercial, educational broadcast stations and as such intended for ITFS to be exempt from Auction Authority. The logic of such an exclusion is clearly reflected in the many similarities between ITFS and non-commercial, educational broadcast stations. Further, the application of competitive bidding procedures to ITFS would be devastating to the educational community.

Should the Commission determine it is compelled to utilize auctions to license ITFS, it should do so only prospectively and not retroactively. It has the authority to make such a distinction in the implementation of auctions in a radio service and should use such authority herein to avoid grossly unfair and prejudicial results.

Should the Commission determine it is compelled to retroactively apply Auction Authority to ITFS, then it should first modify the eligibility requirements for pending applicants in order to resolve multiple mutually exclusive situations and where those modified standards leave only one qualified applicant, award a license to such applicant without any auction.

Lastly, if the Commission believes it is compelled to adopt Auction Authority for ITFS, it should also adopt certain service specific rules to: safeguard against the utilization of auctions to resolve mutually exclusive modification applications; implement sequential open outcry bidding; regulate the filing of applications through the use of windows; and, utilize certain bidding credits.

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	)	<b>GC Docket No. 92-52</b>
<b>Reexamination of the Policy</b>	)	
<b>Statement on Comparative</b>	)	
<b>Broadcast Hearings</b>	)	
	)	
<b>Proposals to Reform the Commission's</b>	)	<b>GEN Docket No. 90-264</b>
<b>Comparative Hearing Process to</b>	)	
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**JOINT REPLY COMMENTS**

College of the Albemarle, Asheville-Buncombe Technical Community College, Belmont Abbey College, Blue Ridge Community College, Brunswick Community College, The Crary School, Currituck County Schools, Davidson County Community College, Durham Technical Community College, Fayetteville Technical Community College, Forsyth Technical Community College, Hoke County Board of Education, James Sprunt Community College, Johnston Community College, Lenoir Community College, Mitchell Community College, Moore County Schools, Nash Community College, Pamlico Community College, Pitt Community College, Queens College, Randolph Community College, Richmond Community College,

Roanoke Rapids Graded School District, Sandhills Community College, Stanley Community College, Vance-Granville Community College, Wake Technical Community College, Wilson Technical Community College, and Wireless One of North Carolina, L.L.C. ("WONC") ("Joint Commenters"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's ("Commission") Rules, hereby submit these Joint Reply Comments regarding the use of competitive bidding to resolve mutually exclusive applications to provide Instructional Television Fixed Service ("ITFS").

## **I. INTRODUCTION**

In its Notice of Proposed Rulemaking ("NPRM"), the Commission requested comments regarding the application of competitive bidding to resolve mutually exclusive ITFS applications, including those ITFS applications currently pending at the Commission. Id. at ¶100. Joint Commenters timely filed Comments regarding the NPRM and herein respond to the Comments filed by other parties.

In their Comments to the NPRM, Joint Commenters strongly opposed the implementation of competitive bidding procedures to license ITFS. With but one exception, this opposition was uniformly echoed by the nation's entire ITFS community. This massive opposition is based on the fact that Congress clearly meant to exclude ITFS from competitive bidding, but due to what may be inartful wording, such exclusion may now be in question by the Commission. The outcry against ITFS auctions is so loud and pervasive because such auctions would be devastating to the

ITFS community and the wireless cable industry alike.<sup>1</sup>

**II. THE COMMISSION IS NOT REQUIRED TO UTILIZE COMPETITIVE BIDDING TO LICENSE ITFS STATIONS.**

The Balanced Budget Act of 1997 (the "Balanced Budget Act") amended Section 309(j) of the Communications Act of 1934 (the "Communications Act") to expand the Commission's competitive bidding authority ("Auction Authority") to encompass additional radio services. Markedly, however, Congress specifically carved out certain types of radio services that were not to be subjected to auctions as a licensing procedure.<sup>2</sup> Specifically exempted from Auction Authority were "non-commercial, educational broadcast stations" and "public broadcast stations".<sup>3</sup> The NPRM questions whether, based on the fact that Congress did not specifically refer to ITFS by name as an exempted radio service, the Commission is obligated to implement auctions to license ITFS. Joint Commenters strongly agree with the position of the Wireless Cable Association International, Inc. ("WCA") in its Comments, that Congress, in fact, intended for ITFS stations to fall within the description of "non-commercial, educational broadcast stations" that are exempt from Auction Authority.<sup>4</sup>

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<sup>1</sup> The Hispanic Information and Telecommunications Network ("HITN") supported the application of competitive bidding to ITFS. See HITN Comments. It is noted that as a "national filer", HITN has little chance of qualifying to obtain an ITFS license in the face of a competing qualified institution that is local to the service area. Thus, it appears that HITN's Comments in support of ITFS auction are designed to overcome its qualification problem, not address the needs of the ITFS community.

<sup>2</sup> See Public Law No. 105-33, 11 Stat. 251(1997) at § 3002(a)(2).

<sup>3</sup> See 47 U.S.C. §§ 309(j), 367(6).

<sup>4</sup> See WCA Comments at p. 4.

Notably, Congress did not specifically include ITFS within the ambit of the Commission's Auction Authority. In fact, as WCA points out, the only discussion of licensing methodology for ITFS is in the Conference Report to the 1993 Budget Act, where Congress specifically recognized ITFS as a unique service that should be exempt from auctions because "the principal use of licensees in the Instructional Television Fixed Service is the provision of educational television programming services to public school systems, parochial schools and other educational institutions." See WCA Comments at p. 5. Accordingly, as WCA notes, Congress specifically excluded ITFS from being licensed pursuant to auctions when Congress passed the 1993 Budget Act.<sup>5</sup>

It is clear that Congress equated ITFS with "non-commercial, educational broadcast stations" in the 1993 Budget Act. And, there is no evidence in the 1997 Balanced Budget Act or in its legislative history that Congress intended to change its mind regarding the categorization of ITFS stations as "non-commercial, educational broadcast stations". Had it meant to do so, Congress could easily have specifically identified ITFS as now being subject to Auction Authority when it authored the 1997 Balanced Budget Act. It chose not to do so. Therefore, the Commission must heed the explicit intent of Congress that ITFS be exempted from Auction Authority.

Although for certain purposes, the Commission does not categorize ITFS as a broadcast service, Commission designations for different purposes are not germane to Congressional intent. That Congress equated ITFS with "non-commercial, educational broadcast stations" is clear from

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<sup>5</sup> See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 23348, 1352 (1994).

the documentation, and Congressional intent should not be controverted by the technical definitions the Commission uses for different purposes in regulating various services under its rules and regulations. As WCA points out in its Comments, the Commission has also, on occasion, referred to ITFS as a broadcast service. WCA Comments pages 6-9. In fact, the similarity between ITFS and non-commercial educational broadcast stations has led the Commission to utilize very similar rules and policies regarding the two services with respect to a number of matters impacting licensing procedures (such as financial qualifications). ITFS licensees, like non-commercial educational broadcast stations, are exempt from application fees. The consistency with which the Commission has treated the ITFS and non-commercial broadcast stations certainly supports similar treatment regarding forbearance from applying Auction Authority to licensing ITFS. *See* WCA Comments, p. 9-10.

In its Comments, the Association of America's Public Television Stations ("AAPTS"), likewise points out that the express language of §309(j)(2)(C) of the Communications Act specifically exempts non-commercial, educational broadcast stations from Auction Authority. The determination that those stations are exempted from Auction Authority as set forth in §397(6) of the Communications Act, is based on certain eligibility requirements. ITFS entities meet all of the eligibility requirements set forth in §397(6). Therefore, as AAPTS concludes, ITFS is not subject to Auction Authority and to utilize auctions to license ITFS would subvert clear Congressional intent. AAPTS Comments at pages 5-7.

With but one exception, the entire ITFS community which filed comments regarding the NPRM opposed the use of auctions to license ITFS. The sole supporter of ITFS auctions, HITN, does not offer the kind of local service the Commission encourages under its current ITFS

licensing procedures. It appears that HITN is attempting to utilize this NPRM as a vehicle to encourage the Commission to disavow its localism policy for ITFS. HITN's comments do not analyze the Congressional discussion of ITFS in the Omnibus Budget Reconciliation Act of 1993 and neither do they acknowledge the Commission's dual treatment of ITFS as both broadcast and non-broadcast under its own rules. HITN Comments pages 4-6. In its Comments, HITN compares ITFS licensees and applicants to public TV and radio broadcast stations in order to explain Congress' failure to specifically exempt ITFS from the mandatory auction requirement. HITN Comments at p. 6. Such a comparison is wholly inappropriate. Unlike public TV and radio stations which often obtain money through the Public Broadcasting Service ("PBS"), most educational institutions do not raise money through telethons or other similar forms of fundraising. In fact, most ITFS applicants and licensees are educational institutions which are dependent upon Federal and state funding. ITFS applicants and licensees are more similar to non-commercial broadcast station licensees which are specifically exempted from competitive bidding.

In its Comments, HITN also claimed that use of competitive bidding for pending ITFS mutually exclusive applications would be more efficient and will serve the public interest. *Id.* at p. 7. This is not accurate. The applications that were filed during the October Window have been pending for more than two and one half years and it would be grossly unfair to those applicants to delay, yet again, the processing of their applications. Most of these applicants are educational institutions which can ill afford to bid for ITFS spectrum in an auction. Indeed, there is little evidence that auctioning the spectrum would generate any significant revenue or that Congress ever anticipated any revenue from ITFS when the Congressional Budget Office estimated future auction revenues.

Contrary to HITN's assertions, the Commission's existing comparative qualifications licensing process ("Point System") has efficiently and effectively served the Commission's public interest mandate for ITFS. HITN's support of the application of Auction Authority to ITFS licensing reflects only HITN's lack of comparative qualifications. HITN's Comments should be viewed accordingly.

### **III. THE UNIQUE NATURE OF ITFS SHOULD EXEMPT IT FROM AUCTION PROCEDURES.**

As WCA, APTS and Joint Commenters pointed out in their respective Comments, ITFS is unique amongst radio services. <sup>6</sup> ITFS provides unique services to the educational community. The nature of the service was carefully considered by the Commission and very specific criteria was set out for the primary licensing of local, accredited institutions which proposed 40 or more hours of for-credit programming. <sup>7</sup> As the WCA pointed out in its Comments, in adopting its licensing criteria for ITFS, the Commission specifically referred to "the motive and importance of the valuable educational objectives of ITFS and the significant differences between applicants in the ITFS service". WCA Comments pages 11-12. The licensing procedures developed by the Commission have been effectively implemented for over 10 years with the result that hundreds of ITFS stations nationwide have been licensed to provide unique educational programming. Substituting Auction Authority for the Commission's current licensing procedures will undermine the public service mission of ITFS. Application of auction procedures to ITFS will, in fact, eviscerate the entire purpose of the radio service. Congress did

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<sup>6</sup> See APTS Comments, pp. 9-11; WCA Comments pp. 11-14; Joint Comments at p. 3.

<sup>7</sup> See 47 C.F.R. §74.913(b) ("Point System")

not intend for such a result and the Commission should not permit such a result to occur.

**IV. SHOULD THE COMMISSION DETERMINE TO APPLY AUCTION PROCEDURES TO ITFS, IT SHOULD DO SO PROSPECTIVELY ONLY AND NOT RETROACTIVELY.**

As WCA and Joint Commenters pointed out in the their Comments, hundreds of ITFS applications have been pending before the Commission since October, 1995 (the "October Window").<sup>8</sup> These applications have been pending for more than two and one half years and considerable time, effort and capital has been expended both to file the applications and resolve mutually exclusive situations during the pendency of the applications. The ITFS spectrum sought in the applications is in many cases critical to the operations of commercial wireless cable systems as well as to the distribution of distance learning programming by the institutions who filed the applications. Regardless of how the Commission determines to license future ITFS spectrum, applications currently pending before the Commission should be processed according to the rules and policies in place when the applications were filed.

Switching horses mid-stream and abandoning the licensing procedures in effect when the applications were filed would be devastating to both the ITFS community and commercial wireless cable industry. As WCA pointed out in its Comments, the Commission has previously switched to the use of auctions to award licenses for existing radio services and in doing so has chosen to process pending applications for those radio services under the rules in existence when the applications were filed. This was the case when the Commission implemented auction procedures for pending cellular served area applications and MDS applications. *See* WCA

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<sup>8</sup> *See* WCA Comments, p. 14 -15; Joint Commenters Comments, p. 2.

Comments at p. 15. Given the unique service provided by ITFS entities, no less consideration can be afforded in the instant situation. Clearly the Commission has the authority to exempt pending ITFS applications from auctions and it should utilize such authority in the instant situation. (Only lotteries are prohibited, not comparative proceedings.) Further delay in licensing ITFS could be deadly in the case of commercial wireless cable operations that are currently under enormous financial pressure and extremely detrimental to ITFS applicants that are trying to implement service to the public.

**V. IF THE COMMISSION BELIEVES IT MUST IMPLEMENT AUCTION PROCEDURES TO LICENSE ITFS, THEN IT SHOULD IMPLEMENT CHANGES TO EXISTING RULES PRIOR TO INSTITUTING ITFS AUCTIONS.**

If the Commission believes it is compelled to apply auction procedures to the licensing of pending ITFS applications, then it should implement changes to its existing rules prior to implementing auctions, in order to effectuate its existing ITFS policies and in order to eliminate multiple mutually exclusive situations. The Commission should change the eligibility requirements for pending ITFS applicants to include only those local, accredited institutions proposing an excess of 40 hours of for-credit programming in their applications. By thus changing the eligibility requirements for pending ITFS applicants, the Commission will realize two very important public interest goals.

First, it will eliminate a number of existing situations where there are pending ITFS applications that are electronically mutually exclusive, but where the prevailing applicant has been identifiable since the time that the applications were filed nearly two and one half years ago

(which is long before the passage of the 1997 Balanced Budget Act). Had the Commission, in fact, processed the pending applications in a more timely manner, the ITFS licenses for the pending applications would have been awarded prior to Congress approving the 1997 Balanced Budget Act. Secondly, it will assure that the entities for whom the ITFS was primarily designed have an opportunity to obtain licenses. It would avoid the unfair result of non-local applicants, or those local applicants proposing less than 40 hours of for credit programming, that had no chance of obtaining an ITFS license in a comparative analysis, from having a second chance in an auction environment and prevailing in the award of an ITFS license. (Auctions could be used as tie-breakers in situations where there are two or more local, accredited applicants proposing forty or more hours of for credit programming.)

The Commission has the authority to retroactively change the eligibility requirements for pending ITFS applicants and has utilized such authority previously. In the case of the non-commercial nationwide 220 MHz service, the Commission originally provided that applicants could utilize excess capacity for commercial operations and satisfy build out requirements accordingly. After the application filing window closed, the Commission restricted the eligibility to non-commercial use only, thereby rendering ineligible those applicants who could not satisfy the 70-market construction minimum except via selling excess capacity for commercial use. Because the Commission changed the requirements after the applications had been filed, it anticipated that certain applicants would no longer be eligible and the Commission made available application fee refunds to all those applicants who had to withdraw. (That necessity would not

apply in the instant situation, where there was no application filing fee).<sup>9</sup>

By implementing the proposed change to the eligibility rules for pending ITFS applicants, the Commission would effectuate its long standing policies regarding ITFS, while simultaneously complying with what it considers to be its mandate from Congress regarding application of Auction Authority to ITFS licensing.

**VI. SERVICE SPECIFIC RULES MUST BE USED TO PRESERVE THE ITFS IF AUCTION AUTHORITY IS IMPLEMENTED.**

Joint Commenters support the retention of the current engineering based methodology of assessing mutual exclusivity for ITFS and believe that it is consistent with the requirement of §309(j). Joint Commenters support WCA's opposition to an implementation of any geographic licensing scheme that would artificially create mutual exclusivity. WCA Comments pp. 18-20. Further, Joint Commenters support WCA's proposal for the use of a sequential open outcry bidding methodology. WCA Comments pp. 21-24. Such a methodology would have the advantage of being quick and decisive. It would take into account that there is little elasticity in the demand for ITFS licenses in different geographic locations. Given the number of ITFS entities that do not deal with the Commission's rules and regulations on a regular basis, it would take into account their relative inexperience and would not require them to become experts in the complicated auction rules and regulations that apply to remote bidding. The sequential bidding methodology would also effectively deal with daisy-chain situations.

Joint Commenters also support WCA's proposal to regulate the filing of applications

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<sup>9</sup> Amendment of Part 90 of the Commission's Rules to provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 8 FCC Rcd 4161 (1993).

through the use of windows. WCA Comments pp. 24-26. This would be particularly effective in ensuring that auctions are not used in processing mutually exclusive modification applications.

Joint Commenters also strongly support WCA's proposal for the implementation of certain bidding credits if Auction Authority is applied to ITFS. WCA Comments pp. 27-28. Such credits would preserve the long standing public policy goals the Commission identified when it implemented the ITFS comparative Point System. If, in fact, the Commission determines it must apply Auction Authority to pending ITFS applications, then the bidding credits should be applied in that event as well.

Joint Commenters strongly oppose the type of service specific rules suggested by HITN in its Comments, Id. at 10-13. In the case of mutually exclusive ITFS applicants who do not want to enter into a settlement resolving the conflict, HITN proposes that the Commission force applicants to divide the channels equally (which of course, eliminates the need for an auction). If the Commission believes it should and can implement the resolution of mutual exclusivity amongst ITFS applicants with the kind of format suggested by HITN, then it should divide the channels among the non-settling applicants as follows, using the Commission's existing Point System as a guideline:

If there is only one local, accredited institution proposing 40 hours of qualified programming, it should receive all the channels.

If there is more than one local, accredited institution proposing 40 hours of qualified programming, then the channels should be split equally among such institutions.

If no local, accredited institution is proposing 40 hours of qualified programming, then all of the local accredited institutions should split the channels equally.

If there are no local, accredited institutions amongst the mutually exclusive applicants, then the non-local institutions should split the channels equally.

HITN's proposed mutual exclusivity resolution methodology has no basis in existing Commission rules, policies or precedent. In contrast, Joint Commenters' proposal would implement the Commission's long standing goal of fostering localism and the distribution of qualified educational programming by ITFS licensees.

## **VII. CONCLUSION**

In reviewing the legislative history and circumstances surrounding the 1993 Budget Act and the 1997 Balanced Budget Act, there is ample evidence to support the conclusion that Congress intended to exclude ITFS from Auction Authority. Examination of the similarities between ITFS and non-commercial broadcast stations and the unique educational nature of ITFS further supports this conclusion. The Commission should therefore follow Congress' clear intent to exempt ITFS from Auction Authority.

Should the Commission determine that it is compelled to apply Auction Authority to ITFS, then it must do so only prospectively and not retroactively. ITFS applications filed during the October Window should be processed according to the Commission rules and regulations in existence at the time the applications were filed.

Should the Commission determine that it must apply Auction Authority to both pending and future ITFS applications, then it should first modify its rules regarding the eligibility of pending applicants in order to eliminate multiple mutually exclusive situations and award the licenses in accordance with the Commission's long standing policies regarding ITFS. Further, if ITFS auctions are implemented, the Commission should adopt certain service specific rules to: safeguard against the utilization of auctions to resolve mutually exclusive modification

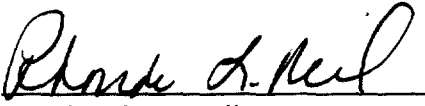
applications; establish filing windows; utilize sequential open outcry bidding; and, apply bidding credits to preserve the educational objectives of ITFS.

Respectfully submitted,

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